

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Santosh Prakash	Team: Squad #8	CCRB Case #: 201702363	<input type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Monday, 03/27/2017 2:55 PM	Location of Incident: Beach 19th Street and Cornaga Avenue	Precinct: 101	18 Mo. SOL 9/27/2018	EO SOL 9/27/2018	
Date/Time CV Reported Tue, 03/28/2017 2:02 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Tue, 03/28/2017 2:02 PM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Phillip Johnson	07559	947112	NARC BS
2. SGT Harrison Berkowitz	661	941417	101 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Janan Lewis	07344	933929	101 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Phillip Johnson	Abuse: Police Officer Phillip Johnson stopped the vehicle in which § 87(2)(b) was an occupant.	
B.SGT Harrison Berkowitz	Abuse: Sergeant Harrison Berkowitz stopped the vehicle in which § 87(2)(b) was an occupant.	
C.POM Phillip Johnson	Abuse: Police Officer Phillip Johnson frisked § 87(2)(b)	
D.POM Phillip Johnson	Abuse: Police Officer Phillip Johnson searched § 87(2)(b)	
E.POM Phillip Johnson	Abuse: Police Officer Phillip Johnson interfered with § 87(2)(b)'s use of a recording device.	
F.POM Phillip Johnson	Abuse: Police Officer Phillip Johnson frisked § 87(2)(b)	
G.POM Phillip Johnson	Abuse: Police Officer Phillip Johnson frisked § 87(2)(b)	
H.POM Phillip Johnson	Abuse: Police Officer Phillip Johnson searched § 87(2)(b)	
I.POM Phillip Johnson	Abuse: Police Officer Phillip Johnson searched the vehicle in which § 87(2)(b) was an occupant.	
J.POM Phillip Johnson	Discourtesy: Police Officer Phillip Johnson spoke discourteously to § 87(2)(b)	
§ 87(4-b), § 87(2)(g)		
§ 87(4-b), § 87(2)(g)		

Case Summary

On March 27, 2017, at approximately 4:55 pm, at Beach 19th Street and Cornaga Avenue in Queens, PO Phillip Johnson and Sgt. Harrison Berkowitz stopped § 87(2)(b)'s vehicle, occupied at the time by § 87(2)(b) and his friends § 87(2)(b) and § 87(2)(b) (**Allegations A, B**). PO Johnson advised § 87(2)(b) that the vehicle was being stopped for his obscured rear license plate, and obtained his and § 87(2)(b)'s documents. Shortly thereafter, without further explanation, PO Johnson ordered § 87(2)(b) out of the vehicle, frisked and allegedly searched him (**Allegations C, D**). PO Johnson then came around the passenger side of the vehicle and ordered § 87(2)(b) out. When § 87(2)(b) tried to exit with a video recording cell phone in his hand, PO Johnson instructed him to leave the phone inside the vehicle (**Allegation E**). PO Johnson then frisked § 87(2)(b) (**Allegation F**). Ordering § 87(2)(b) out, PO Johnson frisked and allegedly searched him as well (**Allegations G, H**). PO Johnson then searched the interior of the vehicle. (**Allegations I**) Recovering nothing, PO Johnson advised § 87(2)(b) that he would be released without a summons. When § 87(2)(b) asked him for his badge number, PO Johnson provided it while stating "I don't give a fuck." (**Allegation J**) Sgt. Harrison bore supervisory responsibility for PO Johnson's actions during the stop. (**Allegation K**)

§ 87(4-b), § 87(2)(g)

§ 87(2)(b)'s cell phone footage is embedded in this report on page 4. (BR04) § 87(2)(g)

Mediation, Civil and Criminal Histories

§ 87(2)(b) rejected mediation. Notices of claim results are pending. § 87(2)(b), § 87(2)(c) No summons was issued as a result of the incident.

Civilian and Officer CCRB Histories

- § 87(2)(b) filed a prior complaint § 87(2)(b). § 87(2)(b) and § 87(2)(b) have not filed prior complaints.
- PO Johnson has been a member of service for 9 years: he was a subject in 4 prior cases, on 4 allegations, none of which were substantiated; § 87(2)(g)
- Sgt. Berkowitz has been a member of service for 11 years: he was a subject in 3 prior cases, on 3 allegations, none of which were substantiated; § 87(2)(g)

Findings and Recommendations

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Allegation A: Police Officer Phillip Johnson stopped the vehicle in which § 87(2)(b) was an occupant.

Allegation B: Sergeant Harrison Berkowitz stopped the vehicle in which § 87(2)(b) was an occupant.

Allegation C: Police Officer Phillip Johnson frisked § 87(2)(b)

Allegation D: Police Officer Phillip Johnson searched § 87(2)(b)

Allegation F: Police Officer Phillip Johnson frisked § 87(2)(b)

Allegation G: Police Officer Phillip Johnson frisked § 87(2)(b)

Allegation H: Police Officer Phillip Johnson searched § 87(2)(b)

It is undisputed that on March 27, 2017, at approximately 4:55 pm, § 87(2)(b)'s two-door red Nissan was stopped at Beach 19th Street and Cornaga Avenue for an equipment violation under §420 of the VTL, for which no summons was ultimately issued. It also undisputed that § 87(2)(b) and § 87(2)(b) were subsequently frisked by PO Johnson.

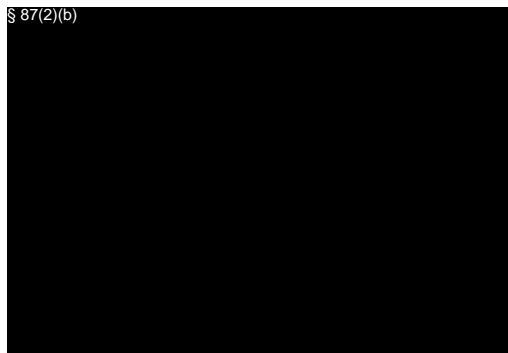


Fig. 1 – Rear Plate (BR05)

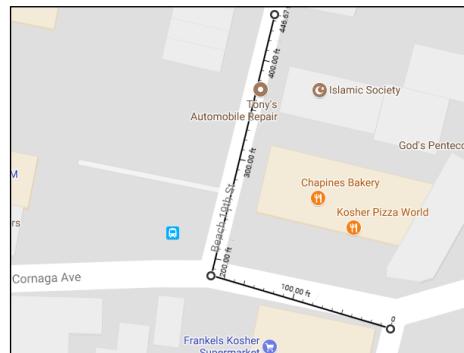


Fig. 2 – Incident Location (BR06)

§ 87(2)(b) who was driving the vehicle with § 87(2)(b) in the front passenger seat and § 87(2)(b) in the rear, testified that he had just passed the officers' unmarked black Chevy Taurus a few minutes earlier, after seeing it standing at Evergreen Street and Beach 19th Street. Upon turning left onto Cornaga Avenue and making the quick right to continue onto Beach 19th Street, § 87(2)(b) heard sirens and saw the black Taurus behind him. § 87(2)(b) slowed down but did not pull over immediately because vehicles were parked curbside; he came to a halt at the middle of the block, where he found a clearing. PO Johnson came to the driver's-side door, and Sgt. Berkowitz and PO Lewis approached on the passenger side. Upon obtaining his driver's license and § 87(2)(b)'s registration and insurance, PO Johnson explained the reason for the stop – that the "Empire State" inscription on the rear plate was covered by § 87(2)(b)'s decorative plate frame – and went back to the police vehicle (see plate photograph, Fig. 1 above ; BR05). Returning shortly thereafter, PO Johnson instructed § 87(2)(b) to exit, without explanation or further questioning. When § 87(2)(b) complied, PO Johnson frisked the full length of his body, searched his pockets, and ordered him to the rear of the vehicle. (BR01)

§ 87(2)(b) and § 87(2)(b) stated that they were then ordered out and frisked in the same manner. § 87(2)(b) also alleged that his pockets were searched. All three occupants stated that they sat still in their seats upon being pulled over and denied moving around or reaching under their seats at any point in time. After ordering them to the rear, PO Johnson searched the interior of the vehicle. (BR01-BR03)

Embedded below, the four minute video recorded by § 87(2)(b) opens with § 87(2)(b) already removed from the vehicle. At 00:47, § 87(2)(b) is removed from the vehicle and frisked by PO Johnson. At 1:47, § 87(2)(b) is removed and frisked (not fully seen, but acknowledged so PO Johnson). At 02:45, PO Johnson enters the vehicle and begins to search the front and rear of the passenger compartment. The recording phone appears to fall at 3:23. (BR04)



Cell Phone Video

PO Johnson testified that he observed the coup's obscured rear plate while traveling behind it on Beach 19th Street (see license plate photo at Fig. 1 below; BR05). Citing N.Y. VTL 402-1, PO Johnson stated that the partial obstruction – even though it was only “The Empire State” inscription that was covered by the frame – was still a violation: “In New York State...nothing should be covering the plate, nothing should be around the plate, no plastic covers, no outside borders, no trim no nothing.” Deciding to enforce the VTL, PO Johnson engaged his lights and sirens as the vehicle turned left onto Cornaga Avenue. However, the vehicle did not immediately pull over. Rather, it continued on Cornaga Avenue for approximately fifty feet and then turned right onto the continuation of Beach 19th Street, where it traveled down the block for another 200 yards before finally stopping abruptly in the middle of the street (see map at Fig. 2 below; BR06). PO Johnson stated that the vehicle neither slowed down nor accelerated during the interim – it just kept traveling at a constant speed and came to an abrupt halt in the middle of the street. Additionally, PO Johnson stated that he observed the vehicle's three occupants make furtive movements during this period of travel. When he engaged lights and sirens at Cornaga Avenue, the rear passenger turned around to look at the officers, and then leaned forward, as if in conversation with the occupants at the front; the driver then appeared to say something to the front passenger, who then also leaned forward, towards the undercarriage of his seat. There was also “constant movement” in the vehicle as the vehicle then turned onto Beach 19th Street, but PO Johnson could not describe any specific motions, beyond the earlier-observed forward leaning. PO Johnson had no line of sight on the occupants' hands when they were making these motions. After pulling over, all activity inside the vehicle ceased. (BR07)

PO Johnson stated his concerns regarding this movement was further elevated when he found out from either Sgt. Berkowitz or PO Lewis – at about the same time he exited and approached the driver's side window – that the vehicle license plate came back to § 87(2)(b) whose name he immediately recognized as criminally-affiliated and “not a good guy.” PO Johnson stated that § 87(2)(b) was well known to the precinct's Anti-Crime team, due to a history of arrests for weapons possession. However, PO Johnson was significantly unclear on what this information

entailed and how it was relayed: he said that he had never arrested or interacted with § 87(2)(b) himself; he did not recall the date of § 87(2)(b)'s most recent weapons arrest; he did not recall what type of weapons § 87(2)(b) was found with, and whether or not they included firearms; he did not recall exactly when the check – likely run against the DAS Lite database on a departmental phone – was conducted; and he did not recall when or how the results – which he never saw himself – were conveyed to him. PO Johnson did not know whether Sgt. Berkowitz and PO Lewis also recognized § 87(2)(b)'s name. (BR07)

Upon engaging the occupants, explaining the reason for the stop, and obtaining § 87(2)(b)'s documents § 87(2)(b) was unable to produce his driver's license), PO Johnson proceeded to order them out of the vehicle one by one, so they could be frisked for weapons. PO Johnson had not observed any further indication that the occupants had secreted any weapons in the vehicle, or that they were concealing weapons on their persons. However, PO Johnson stated that their previously furtive movements were enough to make him fear for his safety. Regarding the passengers' forward leaning, PO Johnson stated: "I don't know if he's hiding something, if he's dropped something – he could have dropped his gummy bears if you want, I don't really know. I know that there was movement in the car. I didn't know if he was trying to conceal a weapon – I didn't know what was going on." PO Johnson first removed and frisked § 87(2)(b) then § 87(2)(b) and § 87(2)(b) on the passenger side of the vehicle. He observed no bulges or outlines of concealed weapons under their clothing prior to frisking them. PO Johnson denied searching any pockets. Ordering the occupants to the rear, PO Johnson acknowledged that he then searched the vehicle for weapons. (BR07)

Sgt. Berkowitz testified that the vehicle pulled over promptly after turning onto Beach 19th Street from Cornaga Avenue, and did not suggest either he or PO Lewis had obtained any information on § 87(2)(b) via database checks or otherwise. Sgt. Berkowitz stated that only after the vehicle was stopped did he notice the occupants' furtive movements: as he was about to exit, he observed that all three individuals "rolling" their shoulders back and forth, and turning their bodies (he did not know in what direction); on approach, his line of sight was limited to their shoulders, and he had no visual on their hands. Sgt. Berkowitz initially stated that he did not observe the occupants shift positions, make any reaching motions or bend downwards, but stated that the "rolling" motions were suggestive of reaching, which in turn was suggestive of weapons concealment. Sgt. Berkowitz observed no further suspicious activity after reaching the vehicle and stated -- even after reviewing the video, and despite maintaining that his position was fixed at the passenger-side for the duration of the stop -- that he was not aware that the occupants were frisked or searched, or that the vehicle itself was searched. (BR08)

PO Lewis corroborated Sgt. Berkowitz's account, but added the following: that § 87(2)(b) and § 87(2)(b) were reaching toward the center console area as the officers approached the vehicle; that upon being asked for his driver's license, § 87(2)(b) again started "moving around" in the area around the center console, prompting PO Johnson to order him out; and that as he exited, § 87(2)(b) produced his driver's license and told PO Johnson that he had been attempting to find it. PO Lewis was unable to further describe the movements he observed. (BR09)

PO Johnson made no memo book entries regarding the incident. (BR10) Sgt. Berkowitz documented the stop, noting that the occupants were removed from the vehicle "due to fear of

weapons possession due to demeanor.” (BR11) PO Lewis noted that the occupants were removed for “constant movement.” (BR12)

The warrant transaction records revealed that Sgt. Berkowitz conducted a name check on § 87(2)(b) at 4:55 pm on March 27, 2017. The results came back negative. No name checks were run on § 87(2)(b). The investigation obtained § 87(2)(b)'s profile from the Domain Awareness System (DAS), the database accessed by Sgt. Berkowitz. The profile shows that six of § 87(2)(b)'s seven total arrests have been sealed; the sole un-sealed arrest is for a local law violation. IAB advised the investigation that an officer's DAS check via a department-issued mobile phone would yield the same results. IAB also advised that no license plate checks were run on § 87(2)(b)'s vehicle. § 87(2)(b)'s arrest history on BADS mirrored the DAS results, but included the top charge on his last sealed arrest: § 87(2)(b), § 87(2)(a) 160.50. (BR13)

In New York, vehicle stops are justified when "there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime," or "where the police have probable cause to believe that the driver . . . has committed a traffic violation" – there is “no violation of the New York Constitution if the officer's primary motivation is to conduct an unrelated investigation.” People v Robinson, 97 NY2d 341 [2001]. (BR14) N.Y. VTL 402-1 states that: “Number plates shall be kept clean and in a condition so as to be easily readable and shall not be covered by glass or any plastic material, and shall not be knowingly covered or coated with any artificial or synthetic material or substance that conceals or obscures...and the view of such number plates shall not be obstructed by any part of the vehicle or by anything carried thereon...” (BR15) Courts considering the validity of pretext stops on this very predicate have ruled that the covering of the state name by a license plate holder violates VTL 402-1. People v Newman, 96 AD3d 34 [1st Dept 2012]. (BR16)

At pat-down frisk is justified when an officer has reasonable suspicion of criminal activity *and* "knowledge of some fact or circumstance that supports a reasonable suspicion that the suspect is armed or poses a threat to safety.” Matter of Darryl C., 98 AD3d 69 [1st Dept 2012]. (BR17) “An officer's belief that [a suspect] has had previous arrests is an insufficient basis on which to find an objective suspicion of criminal activity. To hold otherwise would be to exclude all persons with arrest records from the protection of the Fourth Amendment and render them subject to arbitrary stops and inquiries...” People v Brown, 115 AD3d 38 [1st Dept 2014]. (BR18)

"Behavior which is susceptible of innocent as well as guilty interpretation cannot constitute probable cause and innocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand..."People v Barreto, 161 AD2d 305 [1st Dept 1990]. (BR19) “It is well-settled that furtive movements and nervous behavior, without more, cannot provide the police with a founded suspicion of criminality – it would not even justify the officer's question as to whether defendants ‘had any weapons’...”People v Negroni, 38 Misc 3d 1224[A] [Sup Ct, Bronx County 2013]. (BR20) “A passenger who bends down to the floor of a vehicle is not engaged in ‘furtive’ movements. There is nothing presumptively clandestine or sneaky about such activity and it is certainly susceptible of innocent interpretation...” People v Guzman, 153 AD2d 320 [4th Dept 1990]. (BR21)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Allegation E: Police Officer Phillip Johnson interfered with § 87(2)(b)'s use of a recording device.

As the video shows (see 00:40-00:50), it is undisputed that PO Johnson instructed § 87(2)(b) – as he was exiting the vehicle to be frisked – to put his phone down. (BR04)

PO Johnson stated that he told § 87(2)(b) to do so because, as the subject of a frisk, he “didn’t want anything in his hands.” PO Johnson stated: “There are certain weapons disguised as phones and I don’t want an individual I have stopped on the phone...I don’t want him calling anybody – I don’t know what he could do and don’t know what he had.” (BR07)

As stated in Patrol Guide procedure 208-03 and in Departmental FINEST and Legal Bulletin communications, members of service are prohibited from interfering with a person’s “use of [a] recording device to record police interactions” – such interference “violates the First Amendment.” The extent to which this applies to the subject of a police action is not specified in Departmental rules, and has not been addressed in the limited case law on this matter. (BR22)

§ 87(2)(g)

Allegation I: Police Officer Phillip Johnson searched the vehicle in which § 87(2)(b) was an occupant.

PO Johnson acknowledged that he searched the interior of the vehicle after the occupants were removed and frisked; he checked around and under the rear and front seats, and inside the glove compartment and center console. (BR07)

It is settled state law, under what has been called the “furtive movement plus one” rule, that furtive movements alone cannot justify a search of a vehicle once the occupants have been removed. People v. Griffin, 42 Misc. 3d 1210(A) [Crim Ct. 2013]. (BR23) Further intrusion into the vehicle requires evidence of both: 1.) movements within a vehicle suggesting that the suspect was reaching for something that might be a weapon; *and* 2.) “some other suggestive factor(s)” sufficient to activate reasonable suspicion that “there could be a weapon in the vehicle that posed an “actual and specific danger.” People v Newman, 96 AD3d 34 [1st Dept 2012]. (BR16)

§ 87(2)(g)

Allegation J: Police Officer Phillip Johnson spoke discourteously to § 87(2)(b)

As the video shows (4:06), PO Johnson responds to § 87(2)(b)'s request for his badge number as follows: “7559 – I don’t do pictures my friend, you already got me on video – I don’t give a fuck.” (BR04)

PO Johnson stated that he had not intended to be disrespectful or derogatory in using the word “fuck,” and did so because he was agitated by the circumstances – that § 87(2)(b) “was up in

my face,” that he was being verbally combative in refusing to accept his explanation for the stop and the plate violation at issue. (BR06)

Patrol Guide Procedure 203-09 states that officers must remain courteous and respectful when interacting with the general public. (BR24)

§ 87(2)(g)

§ 87(4-b), § 87(2)(g)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

§ 87(4-b), § 87(2)(g)

[REDACTED]

§ 87(4-b), § 87(2)(g)

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Squad: 08

Investigator: _____
Signature Print Date

Squad Leader: _____
Title/Signature Print Date